IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 63

THE STATE OF OHIO, EX REL, NELLIE HUNTER, ON BEHALF OF THE CITY OF AKRON,
Appellant,

v.

EDWARD O. ERICKSON, MAYOR OF THE CITY OF AKRON, *et al.*

ON APPEAL FROM THE SUPREME COURT OF OHIO.

STATEMENT AS TO JURISDICTION

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Appellant appeals from the judgment of the Supreme Court of the State of Ohio, entered on December 27, 1967, affirming the judgment of the Court of Appeals for the 9th Judicial District which held that Section 137, an amendment to the Charter of the City of Akron adopted by a majority vote of the city electorate on November 3, 1964, was consistent with the constitution and laws of Ohio and with the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of Ohio, attached hereto as Appendix A, is reported at 12 Ohio St. 2d 116, 233 N.E. 2d 129. The decision of the Court of Appeals for the 9th Judicial District, attached hereto as Appendix B, is not yet reported.

Jurisdiction

This case was brought pursuant to Chapters 733.56-733.59, 2731 and 2731.02, Ohio Revised Code, to secure a writ of mandamus requiring respondents to process, as provided in Ordinance No. 873-1964 (appended hereto as Appendix C) and Section 6 thereof, as amended by Ordinance No. 926-1964 (appended hereto as Appendix D), appellant's complaint of racial discrimination in her attempt to obtain housing accommodations in Akron, Ohio. Appellant's petition was dismissed by the Court of Appeals for the 9th Judicial District on February 8, 1967. That decision was affirmed by the Supreme Court of Ohio on December 27, 1967, on the grounds that Section 137, an amendment to the Charter of the City of Akron, had rendered the aforesaid ordinances ineffective and inoperative. A notice of appeal was filed in that court on March 16, 1968. Appellant was granted an extension of time in which to file this appeal to and including April 25, 1968, by order of Mr. Justice Stewart. The jurisdiction of the Supreme Court to review this decision on direct appeal is confirmed by Title 28, U.S.C., Section 1257(2). The following decisions sustain the jurisdiction of this Court to review this judgment on direct appeal: *King Manufacturing Co.* v. *City Council of Augusta,* 277 U.S. 100, 114; *Jamison* v. *Texas,* 318 U.S. 413, 414; *Independent Warehouses* v. *Schelle,* 331 U.S. 70, 79; and *Poulos* v. *New Hampshire,* 345 U.S. 395, 402.

Statutes Involved

Ordinance No. 873-1964, Ordinance No. 926-1964, and Section 137 of the Charter of the City of Akron, Ohio, are set forth herein as Appendix C, D and E respectively.

Questions Presented

1. Does a city charter provision, nullifying a pre-existing city fair housing ordinance unless and until approved by a majority vote of the city electorate voting at a regular or general election, deprive appellant, seeking to assert her right not to be subjected to racial discrimination in her effort to securing housing, of due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States?

2. Does a legislative provision which requires the approval by a majority vote of the city electorate of all ordinances regulating real property on racial, ethnic or religious grounds but makes no such requirement as to any other type of legislation, constitute an individuous racial classification within the meaning of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

3. Has the state, where a city charter effectuates a police power limitation so that governmental power to protect against racial discrimination is circumscribed and conditioned on approval of the city electorate, became so substantially involved in maintaining and perpetuating private racial discrimination as to offend guarantees of the Fourteenth Amendment?

Statement

The facts are not in dispute. On July 14, 1964, the Council of the City of Akron, Ohio, enacted fair housing legislation in the form of Ordinance No. 873-1964 (Appendix C). Pursuant thereto equality of opportunity in housing was promulgated as local public policy. The law declared that many of Akron's multi-racial population "live in circumscribed and segregated areas, under substandard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing." Such discrimination was found to be injurious to "public safety, public health and general welfare," was said to compel increased governmental costs, and to cause other forms of segregation and discrimination prohibited by the Constitution of the United States and by the laws and the policy of the State of Ohio and the City of Akron. The ordinance, approved on July 18, 1964, prohibited various forms of racial discrimination in the sale, rental and leasing of housing and established in the Mayor's office a Commission on Equal Opportunity in Housing to administer and enforce its provisions. Thereafter, on July 21, 1964, Section 6 was amended in the form of Ordinance No. 926-1964 (Appendix D) and approved on July 22, 1964.

On August 25, petitions were filed with the City Clerk which resulted in Section 137, proposed as an amendment to the city charter (Appendix E), being placed on the ballots at the general election on November 3, 1964. This provision was passed by the majority of the voters, and provides that any legislation enacted by the city council regulating "the use, sale, advertisement, transfer, listing assignment, lease, sub-lease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry" must first be approved by a majority vote of the city electorate at a

regular or general election before becoming effective. In addition, it was provided that any ordinance in effect at the time of the adoption of Section 137 would have no force or effect until approved by the voters as provided by that provision.

Appellant, a Negro woman, and for whose benefit it was conceded and stipulated that Ordinances Nos. 873-1964 and 926-1964 were enacted, on January 26 and 27, 1965 by affidavit, filed a complaint with the Mayor and the members of the Commission on Equal Opportunity in Housing, that in her effort to secure adequate housing she had been subjected to discrimination, in violation of aforesaid local laws. The commission, on January 30, refused and declined to process or handle appellant's complaint. Thereafter, on February 1, 1965, a similar demand was made upon the City Director of Law to institute mandamus proceedings seeking to compel the commission and the Mayor to enforce the ordinances. The city director refused to bring the requested action. On February 3, 1965, appellant instituted the present proceedings by filing an original petition for writ of mandamus in the Court of Appeals for the 9th Judicial District, pursuant to Chapter 733.56-733.59 and Chapter 2731 to 2731.02, Ohio Revised Code, seeking to compel performance by respondents, the Mayor and the Commission on Equal Opportunity in Housing, of their official duties as mandated by the two aforesaid ordinances. A demurer to the petition was sustained by the Court of Appeals for the 9th Judicial District. On appeal to the Supreme Court of Ohio, this decision was reversed. In effect, the Supreme Court of Ohio held that the fair housing ordinances in question were valid enactments and met state law requirements. See 6 Ohio St. 2d 130, 216 NE 2d 371 (1966).

On remand to the court of appeals, respondents filed an answer admitting the allegations of fact set out herein, but alleging that the adoption of Section 137 as an amendment to the city charter by the majority of the Akron

electorate at the November 3, 1964 general election had rendered the ordinances in question inoperative and ineffective. Appellant, in reply, challenged the validity of Section 137 on state procedural grounds and on the grounds that it constituted a violation of both the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. The cause was thereupon submitted to the court of appeals on the pleadings and stipulations.

On February 8, 1967, that court held Section 137 had been properly placed on the ballot on November 3, 1964; that its terms and enactment by the majority of the electorate were not at variance with either state or federal law, and that by its adoption the fair housing ordinances relied upon by appellant were no longer operative (Appendix B).[1]

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[1] The court held the procedure for placing Section 137 before the voters was that set forth in Chapter 17 (initiative) of the city charter and not, as appellant contended, that required by Section 19 thereof (referendum).

Section 17 is as follows:

Manner of Exercise of Initiative.

> Ordinances and resolutions providing for the exercise of any and all powers of government granted by the Constitution or now delegated or hereafter delegated to municipal corporations by the General Assembly, may be proposed by initiative petition. Such initiative petition must contain the signatures of not less than seven (7) per centum of the electors of the City. The full text of the proposed ordinance or resolution shall be set forth in such initiative petition. Initiative petitions shall be filed with the Clerk of the Council. The proposed ordinance or resolution shall be submitted for the approval or rejection of the electors of the City at the next succeeding regular or general election occurring subsequent to thirty days after such initiative petition or amended petition is found to be sufficient by the Clerk of the Council as hereinafter provided. Any ordinance or resolution proposed by initiative petition may also be submitted to the qualified electors of the City at a special election instead of a

The cause was appealed to the Supreme Court of Ohio, and the lower court judgment was affirmed in a decision entered on December 27, 1967 (Appendix A). The court

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regular or general election, provided that thirty days' notice is given by the Council and such election is regularly called by the Council in the manner provided by law.

Section 19 provides:

Referendum, How Ordered and When Held.

When a petition signed by ten (10) per centum of the electors of the City shall have been filed with the Clerk of the Council within thirty days after an ordinance or resolution shall have been passed by the Council ordering that such ordinance or resolution be submitted to the electors of the City for their approval or rejection, and said petition is found to be sufficient by the Clerk of the Council, as hereinafter provided, the election officer, officers or board having control of elections in the City shall cause such ordinance or resolution to be submitted to the electors of the City for their approval or rejection at the next succeeding regular or general election in any year occurring subsequent to thirty days after the Clerk of the Council finds such petition or amended petition to be sufficient as hereinafter provided; provided, however, that such ordinance or resolution may be submitted to the qualified electors of the City at a special election instead of a regular or general election, provided that thirty days' notice is given by the Council and such election is regularly called by the Council in the manner provided by law. No such ordinance shall go into effect until and unless approved by the majority of those voting upon the same. Nothing in this article shall prevent the City, after the passage of any ordinance or resolution from proceeding at once to give any notice or make any publication required by such ordinance or resolution.

The petition, pursuant to which Section 137 was placed before the voters in Akron at the November 3, 1964 election, was filed in the city clerk's office on August 25, 1964. If Section 19 controlled, the petition would have had to be filed within 30 days of the enactment of the fair housing ordinance. Thus the filing on August 25 would have been out of time. No such time limitation affects proceedings under Section 17. Section 17 requires the petition to be signed by 7% of the electorate while Section 19 requires 10% of the electorate as signatories.

distinguished this Court's decision in *Reitman* v. *Mulkey*, 378 U.S. 369. It said that in *Reitman* a state constitutional provision forbade any regulation of the individual freedom to sell, lease or rent real property, while here Section 137 placed no such absolute limitation on governmental authority. Further, the court stated that, while voter approval was necessary only in respect to legislation adopted by the city council which seeks to regulate the use, sale, rental or lease real property on racial and religious grounds, and that Section 137 was, therefore, class legislation, it constituted a reasonable classification under Ohio law and within the meaning of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Thereupon, appellant brings the cause here for review on appeal.

The Questions Are Substantial

1. Housing discrimination in Ohio, as is true throughout the United States, constitutes a major social problem. "Housing," *United States Commission on Civil Rights* (1961); "A Survey of Discrimination in Housing," *Ohio Civil Rights Commission* (Columbus, Ohio, 1964). Akron, one of the cities in which the Ohio Commission held public hearings, experienced a 217% growth in its Negro population between 1940-1960, the greatest in the state. As a result of the survey referred to above, the Ohio Civil Rights Commission found that the increased migration of Negroes to the urban areas of the state created a critical housing problem. Racial discrimination was said by the Ohio Civil Rights Commission to be the cause for the creation and expansion of black ghettos within the state's urban centers.[2]

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[2] See "A Survey in Discrimination in Housing," op. cit., *supra*, at pp. 16, 20.

Moreover, it was found that public and private costs of maintaining housing discriminatory practices were high; that "segregated residential patterns which typically cause overcrowding require additional expenditures for education, police and fire protection, and health and welfare services."[8]

Further, the commission came to the following conclusions as a result of its exploration of this problem:

> There are also high costs paid directly by individuals. Car insurance companies will charge more where the insured vehicle must be parked on a narrow street, where there are no garage facilities. Accidents occur more frequently there. A dual housing market exists, whereby residences in particular neighborhoods are not available to whole groups of persons because of racial or religious restrictions. The person desirous of selling his house does not have *all* potential buyers vying for the purchase, where discrimination in housing is practiced. With a reduced demand for his house, the seller may have to settle for a lower price. Similarly, the house buyer, regardless of race, will have fewer houses available for consideration if he searches a segregated market. The dual housing market tends to create higher housing costs to Negroes than to whites, with the result that a smaller percentage of the Negro's income is available for consumer spending. The detriment to the economy is obvious.
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> In conclusion, there is a basic two-fold effect of discrimination and segregation in housing. First, it serves as a stimulant to prejudice and consequential further segregation. Second, it constitutes a major threat to the social and economic well-being of the community wherein it exists. The ramifications of this are evident in the area of education, crime and delinquency, health, welfare, and costs to local government, private agencies and individuals.
>
> The relationship between discrimination and segregation is that of a circle. Each is both the cause

[8] Id. at 36.

> and the effect of the other. Whereas the *act* of discriminating or segregating is the result of prejudicial attitudes, these same attitudes are reinforced, and at times fostered, by the *fact* of discrimination or segregation. Negroes invariably inhabit the least desirable housing facilities in any given city. The conclusion is too easily reached that any residential area occupied by Negroes will become a ghetto.[4]

In recognition of these adverse human, social and economic factors, Akron's city council enacted in July, 1964, a fair housing ordinance to insure equality of opportunity in housing and established a commission to enforce its terms (Appendix C, D). The legislation caused widespread discussion and public dispute. After it became law, petitions were circulated to amend the city charter so as to nullify the ordinance and to provide insurance against the enactment of future open housing legislation.

State involvement to any significant degree in the support, maintenance or encouragement of racial discrimination has been held by this Court under a variety of circumstances to constitute forbidden state action within the meaning of the 14th Amendment to the Constitution of the United States. See e.g. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *Anderson* v. *Martin*, 375 U.S. 399; *Robinson* v. *Florida*, 378 U.S. 153; *Evans* v. *Newton*, 382 U.S. 296; *Reitman* v. *Mulkey*, 387 U.S. 369. Affirmative state action to forbid private discrimination is permissible and consistent with the objectives of the 14th Amendment. *Railway Mail Association* v. *Corsi*, 326 U.S. 88, 94. However, while it may not be constitutionally mandated to proscribe private discrimination, a state cannot without running afoul of the guarantees of the 14th Amendment, directly or by indirection, undergird such discrimination, as is done here, so that it is in effect raised to the level of basic governmental pol-

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[4] Id. at pp. 37-38.

icy. It is respectfully submitted that this is the vice of Section 137 at issue on this appeal.

In *Reitman v. Mulkey, supra,* this Court held a California state constitutional provision, Article I, Section 26, enacted by the majority of the electorate voting in a general state-wide election, offensive to the 14th Amendment. This provision forbade the state from limiting the freedom and absolute discretion of any person to refuse to sell, lease or rent real property to any person he so desires. While the issues raised in this appeal are not in all particulars identical with those in *Reitman*, the differences are of degree and do not involve matters of substance or principle. The basic constitutional question is the same, and thus, it is respectfully submitted, *Reitman* v. *Mulkey* governs and controls disposition of this appeal.

Here, as in *Reitman,* fair housing legislation has not been merely repealed. Negroes, the main beneficiaries of equal housing legislation, and their allies in advocating enactment of such laws do not now have only the task of persuading a majority of the city council to adopt a new ordinance prohibiting racial discrimination. They are still required to do that, of course, but more still must be done. After having succeeded at the city council level, proponents of fair housing must now draft, distribute and file with the city clerk petitions calling for adoption of the legislation by the city electorate at the next regular or general election. These petitions must be signed by 10% of the city electorate and filed 30 days after the new ordinance is approved if Section 19 (referendum) of the city charter is applicable.[5] If Section 17 (initiative) applies, only 7% of the city electorate must sign the petitions, and the 30-day limitation does not apply.[6] Whichever of these two pro-

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[5] See op. cit., supra, note 1.

[6] See op. cit., supra, note 1.

visions is found to be controlling, it is clear that fair housing advocates have far more to do now than was true before November 3, 1964.

When the requisite petitions are filed, the matter is then submitted to the electorate by being placed on the ballot at the next regular or general election. Since these elections do not occur each year, if the ordinance is enacted by the council in a year when no regular or general election is scheduled, the petitions must wait a year or more before being submitted to final vote by the residents of the City of Akron. In such circumstances, proponents of fair housing legislation would be faced with another disability. The delay would allow time for counter-pressures to be brought on the council to persuade it to repeal the new ordinance before it is submitted to the voters. Then the process would have to be commenced all over again.

Provided the measure remains intact for submission to the electorate, a majority of the voters in Akron have to be convinced to vote in favor of fair housing before the ordinance can become law. Thus, hurdles against any future enacting of fair housing legislation in the City of Akron are presently considerably higher, and the prospects of success far dimmer than was the case before Section 137 became law. Indeed, Negroes are not only faced with the reality of not being able to muster sufficient strength by resort to the normal democratic process to obtain governmental protection against housing discrimination, but private discrimination in housing is now protected by the government and, therefore, has become in effect the public policy in the City of Akron. In short, what was condemned in *Buchanan* v. *Warley*, 245 U.S. 60; *Shelley* v. *Kraemer*, 334 U.S. 1; and *Barrows* v. *Jackson*, 345 U.S. 249 has now, pursuant to Section 137, become governmental policy in the City of Akron.

It is a fallacy to regard this, as did the court below, as a mere racially neutral decision by the people of Akron

that the regulation of housing on racial grounds is of such special importance that the legislative process in this area must be treated differently than in respect to other kinds of legislation. By majority vote, the electorate in Akron has enacted private racism into law and, as such, has deprived appellant and all other Negro residents of Akron of the protection afforded by the 14th Amendment.

By majority vote, the electorate of Akron repealed not only the fair housing ordinance but tied the government's hand so that it could never on its own initiative in the future successfully enact any such housing legislation. While Section 137 expresses the views of the majority of Akron's electorate, where majority rule violates the guarantees of the due process and equal protection clauses of the 14th Amendment, it cannot prevail. See *Takahashi* v. *Fish & Game Commission,* 334 U.S. 410; *Brown* v. *Board of Education,* 347 U.S. 483; *Yick Wo* v. *Hopkins,* 118 U.S. 356. See Black, "The Supreme Court, 1966 Term, Foreword, 'State Action,' Equal Protection, and California's Proposition 14," *81 Har. L. Rev. 69* (1967).

The court below states that Section 137 (the city charter amendment nullifying the instant fair housing ordinance and requiring that such future legislation be directly approved by the city electorate) is not, as it describes Article 1, Section 26, of the California Constitution, struck down in *Reitman* v. *Mulkey,* 387 U.S. 369, an absolute prohibition against enactment of future fair housing legislation.

The California law was not an absolute prohibition against all future fair housing legislation. Equal housing laws could be enacted provided the difficult task of obtaining approval of a constitutional amendment repealing Article 1, Section 26, could be accomplished. What Section 137 does (as was true of California's Article 1, Section 26), however, is to stack the cards so heavily against the proponents of equal housing legislation as to make all but im-

possible the enactment of such legislation through the ordinary democratic process. A state cannot so limit its authority to protect against private racial discrimination as to become an active participant in the perpetuation of that discrimination. In so doing, the force and effect of its action is to make the discrimination state policy. See *Burton* v. *Wilmington Parking Authority, supra.* Cf. *Gomillion* v. *Lightfoot,* 364 U.S. 339. For the foregoing reasons, it is respectfully submitted that Section 137 is controlled by the decision of this Court in *Reitman* v. *Mulkey, supra,* and as such must be struck down.

2. That the primary purpose of the enactment of the 14th Amendment was to protect the newly-freed black citizen and his progeny from invidious differentiations and distinctions based upon race and color and not applicable to all other persons, was recognized at the very outset. See e.g., *The Slaughter-House Cases,* 16 Wall 36, 81; *Strauder* v. *West Virginia,* 100 U.S. 303, 306, 308. Although principally meant to guarantee full citizenship rights to Negroes, the 14th Amendment has been consistently construed by this Court as requiring that "equal protection and security should be given all under like circumstances in the enjoyment of their personal and civil rights." *Barbier* v. *Connolly,* 113 U.S. 27, 31. Thus, the 14th Amendment has become a shield for all citizens against unreasonable and arbitrary governmental action, and while states are permitted to do "a good deal of classifying that it is difficult to believe rational," *Nixon* v. *Herndon,* 273 U.S. 536, 541, such legislation or regulation must be based upon some real or substantial differences pertinent to a valid legislative objective. See *American Sugar Refining Co.* v. *Louisiana,* 179 U.S. 89, 92; *Lindsley* v. *National Carbonic Gas Company,* 220 U.S. 61, 78-79; *Marchant* v. *Pennsylvania R. Co.,* 153 U.S. 380, 390; *Truax* v. *Raich,* 239 U.S. 33; *Skinner* v. *Oklahoma,* 316 U.S. 535; *Hernandez* v. *Texas,* 347 U.S. 475, 478; *Douglas* v. *California,* 372 U.S. 353, 356-357.

Racial classifications have never been totally outlawed by this Court but in evaluating their validity the 14th Amendment strictures are more rigidly applied. See *Nixon* v. *Herndon, supra.* Because racial classifications are "immediately suspect," *Korematsu* v. *United States,* 323 U.S. 214, 216, "odious to a free people," *Hirabayashi* v. *United States,* 320 U.S. 81, 100, and in most instances are "constitutionally an irrelevance," Mr. Justice Jackson concurring in *Edwards* v. *California,* 314 U.S. 180, 185, they are usually "beyond the pale," Mr. Justice Douglas, dissenting in *South* v. *Peters,* 339 U.S. 276, 278. Indeed, except in times of national peril, when the Court has been reluctant to substitute its judgment for that of the Chief Executive, *Hirabayashi* v. *United States, supra,* or where convinced that no invidious discrimination is being perpetrated, *Tancil* v. *Woolls,* 379 U.S. 19, racial classifications have generally been found to violate the basic guarantees of the 14th Amendment. See *Yick Wo* v. *Hopkins,* 118 U.S. 356; *Buchanan* v. *Warley, supra*; *Oyama* v. *California,* 332 U.S. 633; *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637; *Brown* v. *Board of Education,* 347 U.S. 483; *Anderson* v. *Martin, supra; Virginia Board of Elections* v. *Hamm,* 379 U.S. 19; *McLaughlin* v. *Florida,* 379 U.S. 184; *Loving* v. *Virginia,* 388 U.S. 1. It is not enough that a racial classification be reasonable, it must meet the heavy burden of justification by a showing of overriding circumstances that renders the classification necessary. See *McLaughlin* v. *Florida, supra.* If such racial distinctions are to be upheld, "they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." *Loving* v. *Virginia, supra,* at page 11.

In this instance, Section 137 puts the regulation of real property on racial grounds in a category distinct and separate from that of any other type of legislation. Where the

city council deems it appropriate to seek to protect against racial discrimination in housing, such legislation and such legislation only must be submitted to the voters of the city for approval. All other kinds of legislation become law by passage of the enactment by the city council and approval by the mayor. The court below, while correct in describing Section 137 as a legislative classification, went astray in not recognizing that the charter amendment as a racial classification must be evaluated by stricter standards in determining its constitutional validity, than is true in other types of classifications.

The only reason Section 137 was enacted and the very purpose it serves by placing legislation which seeks to regulate racial discrimination in housing directly subject to the vote of the electorate, was to insure that fair housing legislation would never be enacted. As such, it serves no permissible legislative objective apart from perpetuating racial discrimination which the Constitution condemns. Therefore, the test set forth in *McLaughlin* v. *Florida, supra,* and *Loving* v. *Virginia, supra,* has not been met and Section 137 must fall.

Conclusion

For the foregoing reasons, we submit, the questions presented by this appeal are substantial and raise issues of public importance which should be disposed of by this Court. Because *Reitman* v. *Mulkey*, *Loving* v. *Virginia*, and *McLaughlin* v. *Florida*, considered separately or together, control disposition of this appeal, we urge this Court to note probable jurisdiction and to reverse the judgment below on the authority of those cases without the necessity of oral argument.

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